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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 335.

JAMES S. PRATT, LYLE S. WOODCOCK, MORRIS GARFINKLE, HOUSEHOLD FINANCE CORPORATION, LIBERTY LOAN CORPORATION, AND NATHANIEL W. BARBER,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

CONSOLIDATED BRIEF FOR RESPONDENT IN OPPOSITION TO CONSOLIDATED PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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CONSOLIDATED BRIEF FOR RESPONDENT IN OPPOSITION TO CONSOLIDATED PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

(a) Questions Presented.

1. May the petitioners extend the provisions of the removal statute so that an alleged state denial of non-racial federal rights supports removal under 28 U.S.C. § 1443 (1)?

2. May an alleged past denial of federal equal civil rights at the grand-jury stage of a state criminal prosecution, never before tested within the courts of the state, support pretrial removal under 28 U.S.C. § 1443 (1)?

(b) Statutes Involved.

CIVIL RIGHTS ACT OF 1866, 14 STAT. 27.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

. . . . . .

"Sec. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for

any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty."

REVISED STATUTE (1875).

"Sec. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State

where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the circuit court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the

plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed."

28 U.S.C. § 1443, CIVIL RIGHTS CASES.

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." (June 25, 1948, c. 646, 62 Stat. 938.)

MASSACHUSETTS RESOLVES, 1962, CHAPTER 146.

This resolve, creating the Massachusetts Crime Commission, provides in part:

"Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency,

such evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission."

(c) Statement of the Case.

For the purposes of the petition for certiorari, the respondent adopts the petitioner's statement of facts.

(d) Reasons for Denying the Writ.

THE QUESTIONS OF STATUTORY CONSTRUCTION AND FEDERAL JURISDICTION PROPOSED BY PETITIONER HAVE BEEN ANSWERED BY THIS COURT IN PREVIOUS DECISIONS; THE FACTS OF THE PRESENT CASE DO NOT AFFORD THE COURT A FOUNDATION FOR FURTHER INTERPRETATION OF 28 U.S.C. § 1443 (1).

1. Whether 28 U.S.C. § 1443 (1), Permits Removal to the Federal Courts where a Denial of Non-Racial Civil Rights is Alleged.

"We need not and do not necessarily approve or adopt all the language and all the reasoning of every one of this Court's opinions construing this removal statute, from *Strauder v. West Virginia*, 100 U.S. 303, to *Kentucky v. Powers*, 201 U.S. 1. But we decline to repudiate those decisions, and we decline to do so not out of a blind adherence to the principle of *stare decisis*, but because after independent consideration we have determined, for the reasons expressed in this opinion and in *Rachel*, that those decisions were correct in their basic conclusion that the provisions of §1443 (1) do not operate to work a wholesale disloca-

tion of the historic relationship between the state and the federal courts in the administration of the criminal law."

City of Greenwood v. *Peacock,* Nos. 471 and 649, October Term, 1965, pp. 22-23.

The respondent does not dispute that the removal statute is necessarily color blind. What is submitted is that the denial of equal civil rights must be on a racial basis. Whether the denial is to members of one race or another is irrelevant; section 1443 (1) is available only when the denial of equal civil rights is on some racial basis. *City of Greenwood* v. *Peacock,* p. 23. The Civil Rights Act of 1866 (set out on page 2) was directed principally to the "Black Codes" and to the disabilities of slavery which had been firmly interwoven in the laws of the Southern states. *Baines* v. *City of Danville,* 357 F. 2d 756 (4th Cir. 1966). The 39th Congress confirmed basic rights conferred by abolition, but the Act's removal section was limited to those "who are denied or can not enforce in the courts or judicial tribunals of the State or locality where there may be any of the rights secured to them by the first section of this act." Clearly this limited to removal to those showing a right set out in section 1, based on racial equality. *Georgia* v. *Rachel,* No. 147, October, 1965, p. 10.

Congress, in 1875, separated the removal section from what had been section 1 of the 1866 Act. Faced with the problem of describing the scope of the removal section in terms other than protection of those rights provided in "the first section of this Act," Congress chose the generic language "any right secured to him by any law providing for the equal rights of the citizens of the United States, or of all persons within the jurisdiction of the United States . . . ," perhaps with the intention of including later acts

couched in equalitarian language, such as the Civil Rights Act of 1964.

The present statute is the product of a 1948 revision, which changed much of the language of the removal statute, but not substantially the language which concerns the instant case. Removal lies for a deprivation of "a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."

It has been suggested that the removal statute should go beyond providing a remedy for denial of racially based rights. However, no case nor analysis has suggested that removal should be granted on a non-racial basis. *Kentucky* v. *Powers,* 201 U.S. 1 (1906), cited and relied upon by petitioners, held that a defendant could not remove to the federal courts where the alleged denial of equal civil rights was non-statutory and was on the basis of membership in a political party. *Strauder* v. *West Virginia,* 100 U.S. 303 (1879), also relied upon by petitioners, held that a Negro defendant could remove on the ground that he was denied his equal civil rights by a West Virginia statute forbidding Negroes from serving on juries. Both of these cases are consistent with limiting the right of removal to cases involving racial discrimination.

Even Professor Amsterdam, who argues for a broader interpretation of section 1443, says:

> "[T]he desired limiting principle is best supplied by the construction of 'law providing for ... . equal civil rights' suggested in the immediately preceding paragraphs: Statutory law whose purpose is to protect minority groups in their equal enjoyment of civil rights."
>
> Amsterdam, "Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal

Removal And Habeas Corpus Jurisdiction To Abort State Court Trial," 113 U. Pa. L. Rev. 793, 874.

Unless the Court in the earlier decisions did not clearly indicate that Congress intended to make racial discrimination the exclusive grounds for removal, the recent statements of the Court are conclusive of this issue:

> "On the basis of historical material that is available we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality."
>
> *Georgia* v. *Rachel* (*supra*), p. 11.

In this present case petitioners are attempting to have the interpretation of the removal statute extended far beyond any previous interpretation of its language. No denial of equal racial civil rights is alleged; nor is any denial of equal civil rights on the basis of a bias against any minority group alleged. It is respectfully submitted by the Commonwealth, therefore, that the long line of decisions recently affirmed by *Rachel* and *Peacock* are sufficient to indicate that petitioners have shown no grounds for removal to the federal courts under 28 U.S.C. § 1443 (1).

2. Whether the Removal Statute can be Utilized in a Situation where the Alleged Denial has Already Occurred and has Never been Tested in the Courts of the Jurisdiction.

Petitioners allege that the facts of the present case are different from any other case or proceeding in Massachusetts. They state that the alleged denial of equal civil

rights has already occurred, and further that the procedures utilized by the Crime Commission in the present case have never been tested in the appellate court of the Commonwealth.

> "Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts."
>
> *Rachel* (*supra*), p. 19.

> "Under 1443 (1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."
>
> *Peacock* (*supra*), p. 19.

The Court has further indicated that a statute need not be the cause for removal if "an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court." *Rachel,* p. 23. In any event, the very act of bringing the defendant to trial must create a firm prediction that there will inevitably be a denial of a petitioner's equal civil rights.

Peacock, p. 19.

In the present case the procedures complained of had already occurred by the time the petitioners sought removal. Furthermore, the state appellate court has never been

given the full opportunity to declare whether or not the indictment procedure utilized in this case was proper. So it is difficult to ascertain what petitioner means by a "prediction," when the procedure complained of has already been utilized; and it is also difficult to ascertain how an untested procedure can be the basis of a "firm prediction" that the petitioners will be denied their rights.

Whether or not petitioners have been denied their equal civil rights is a matter for appellate review in the state courts and not a matter for removal to the federal courts. It is respectfully submitted that for the Court to permit removal in the present case would lead to a disruption of the long-established relationship of state and federal courts.

Conclusion.

For the foregoing reasons, respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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